No. 18-483

In the
Supreme Court of the United States

KRISTINA BOX, COMMISSIONER OF THE INDIANA STATE DEPARTMENT OF HEALTH, *ET AL.*,
Petitioners,

v.

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., ET AL.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

BRIEF OF *AMICA CURIAE* BEVERLY MCMILLAN, M.D., IN SUPPORT OF KRISTINA BOX, COMMISSIONER OF THE INDIANA STATE DEPARTMENT OF HEALTH, ET AL.

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INTEREST OF AMICA[1]

Amica Beverly McMillan, M.D., is a physician who, before deciding to stop providing abortions, experienced firsthand the impact of viewing and handling fetal remains and thereby realizing the humanity of the unborn.

In 1975, Dr. McMillan helped to open the first abortion clinic in Mississippi. As the first medical director of Family Health Services, Dr. McMillan performed abortions up to twelve weeks gestation. In 1989, Dr. McMillan recounted why she decided to stop performing abortions:

> After [an abortion procedure] was all over, I would leave my patient on the table and I would go over to the suction bottle and I would take the little stockinette out and go outside the room to a sink where I would open the stockinette up, and I personally would pick through it with a forceps and I would have to identify four extremities, and a spine and a skull and the placenta. If I didn't find that, I would have to go back in that room and scrape and suction some more, ... Standing at that sink, I guess I just started seeing these bodies

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[1] Counsel of record for the parties received timely notice of the intent to file this brief and emailed written consent to its filing. No counsel for any party authored this brief in whole or in part. No party or counsel for any party made any financial contribution toward the preparation of submission of the brief.

> for the first time. I don't know what I did before that. I think I just counted. I was cool. Blood didn't make me sick. I could handle all the guts and gore of medicine just fine. But I started seeing this for the first time and it started bothering me.
>
> I remember one afternoon in particular, a very attractive young woman who was the day-to-day manager of the clinic came up to the sink one day while I was getting ready to go through my little procedure, and she said, "Would you let me see? I've never really seen what you look at at the sink." I said, "Sure," and I started showing her. And this happened to be about a 12-week abortion, and that was about the farthest along we went. That day as I was showing her, I remember very clearly seeing an arm and seeing the deltoid muscle, and it just really struck me that day how beautiful that was. The thought just flashed through my mind, "What are you doing? Here is this beautiful piece of human flesh here, ***what are you doing***?" That was one of the very last ones that I did.[2]

SUMMARY OF THE ARGUMENT

A divided panel of the Seventh Circuit held that the State of Indiana's fetal disposition

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[2] http://www.priestsforlife.org/testimonies/1129-testimony-of-beverly-mcmillian-md-former-abortion-provider (as last visited on November 13, 2018).

regulations, requiring that fetal remains be disposed of in a manner similar to other human remains, violated substantive due process because the law was not rationally related to any legitimate government interest. The en banc panel split evenly on whether to grant a petition for rehearing, leaving the panel decision in place.

While Amica agrees with the State that its interest in the humane and dignified disposal of human remains fully justifies the fetal disposition law, they submit this brief to highlight a separate interest served by the law, namely, the interest in protecting the integrity and ethics of the medical profession.

This Court should grant the Petition and reverse the judgment of the Seventh Circuit.

ARGUMENT

THE FETAL DISPOSITION PROVISION SERVES THE GOVERNMENTAL INTEREST IN PROTECTING THE INTEGRITY AND ETHICS OF THE MEDICAL PROFESSION.

In addition to the interest in the dignified treatment of human remains, the State has another legitimate interest in the fetal disposition provision, an interest that this Court has recognized in both abortion and non-abortion contexts. "There can be no doubt the government 'has an interest in protecting the integrity and ethics of the medical profession.'" *Gonzales v.*

Carhart, 550 U.S. 124, 157 (2007) (quoting *Washington* v. *Glucksberg*, 521 U.S. 702, 731 (1997) and citing *Barsky* v. *Board of Regents of Univ. of N. Y.*, 347 U.S. 442, 451 (1954) (State has "legitimate concern for maintaining high standards of professional conduct" in the practice of medicine).

The governmental interest in protecting the integrity and the ethics of the medical profession has both an objective and a subjective component. *Gonzales*, *supra*, at 157 (acknowledging Congress' legitimate concern for the "effects on the medical community *and on its reputation* caused by the practice of partial birth abortion") (emphasis added). *See also Glucksberg*, *supra*, 521 U.S. at 731 (physician assisted suicide "is fundamentally incompatible with the physician's role as healer" and could "undermine the trust that is essential to the doctor-patient relationship by blurring the time-honored line between healing and harming") (internal citations omitted). Thus, the State has legitimate interests both that the medical practitioners act ethically and humanely, and that they be perceived by the public as doing so.

The fetal disposition provision clearly serves both the objective and subjective components of that interest. For the objective component, requiring doctors to distinguish, not just visually but manually, between remains of a human being and medical "waste" following an abortion procedure is likely to counteract, to some degree, the coarsening and dehumanizing effects of abortion practice.

Various instances of the dehumanizing and conscience-deadening effects of performing

abortions, particularly abortions past the first trimester, have come to light in the past few years. One example was provided by Kermit Gosnell, convicted in May 2013 of three counts of murder of children who survived abortion, and 24 counts of committing abortion past the 24-week limit. See *Whole Women's Health v. Hellerstedt*, 579 U.S. ____, 136 S.Ct. 2292, 2313-14, 2343-44 (2016) (describing Gosnell case). The grand jury report that resulted in Gosnell's indictment also recommended that he be charged with several counts of abuse of a corpse. These counts referred to Gosnell's practice of cutting off and preserving the feet of fetuses, as well as storing fetuses in cut-off milk jugs, water containers, and juice cartons. The Medical Examiner testified to the grand jury:

> But certainly things like drink containers, milk containers, water containers, this is not something we do in medical practice. . . . What I do does not deal with living patients, and I would not put something in a plastic drink container. It just – it feels wrong I guess is what I'm saying. It feels wrong.[3]

The grand jury also recommended that Pennsylvania law be amended to criminalize the mutilation of any fetal remains: "No civilized

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[3] Report of Grand Jury in No. 0009901-2008 (1st Jud. Dist. Pa., Jan. 14, 2011), p. 238, online at https://cdn.cnsnews.com/documents/Gosnell,%20Grand%20Jury%20Report.pdf (as last visited on November 6, 2018).

society can accept such an abomination, whether the fetuses in question were viable or not."[4]

Another example of the coarsening effect of disposing of fetal remains inhumanely can be found in the undercover videos published in 2015 and 2016 by the Center for Medical Progress. Various Planned Parenthood doctors were involved in procuring, for a price, fetal tissue for researchers or middlemen tissue procurement companies. That they began to view fetal remains as "line items" and commodities was evidence from recorded comments such as the following:

> *Planned Parenthood Federation of America Senior Medical Advisor (February 26, 2015):*
>
> "We've just been working with people who want particular tissues. Like a, you know, cardia--they want cardiac, or they want eyes, or they want neural. And Bill Rashbaum, back in the day at Einstein, was working with people with Parkinson's disease research, who wanted spinal cords. So I mean, that sort of thing. Certainly, everything we provide--oh, gonads. Oh my god, gonads. Everything we provide is fresh."[5]

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[4] *Id.* at 248.

[5] Center for Medical Progress, "FULL FOOTAGE: PPFA Dr. Carolyn Westhoff" (2015) at 2:44, https://www.youtube.com/watch?v=oar7sw0UtOg (as last visited on November 12, 2018).

Planned Parenthood Federation of America Senior Medical Director (July 25, 2014):

"So then you're just kind of cognizant of where you put your graspers, you try to intentionally go above and below the thorax, so that, you know, we've been very good at getting heart, lung, liver, because we know that, so I'm not gonna crush that part, I'm going to basically crush below, I'm gonna crush above, and I'm gonna see if I can get it all intact."[6]

"You know I asked her at the beginning of the day what she wanted, yesterday she wanted, she's been asking, a lot of people want intact hearts these days, they're looking for specific nodes. AV nodes, SA. I was like wow, I didn't even know, good for them. Yesterday was the first time she said people wanted lungs. And then, like I said, always as many intact livers as possible."[7]

Planned Parenthood Gulf Coast Director of Research (April 9, 2015):

"So if we alter our process and we are able to obtain intact fetal cadavers, then we can make

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[6] Center for Medical Progress, "FULL FOOTAGE: Planned Parenthood Uses Partial-Birth Abortions to Sell Baby Parts" (2015) at 29:39, https://www.youtube.com/watch?v=H4UjIM9B9KQ&t=1928s (as last visited on November 12, 2018).

[7] *Id.* at 31:00.

it part of the budget that any dissections are this, and splitting the specimens into different shipments is this, I mean, that's, it's all just a matter of line items. Knowing that this is what we plan to do. Because it almost seems wasteful at that point that if we've gone through the work, and we've got – and we're going to be sending away a liver and thymus, and we've got other parts that can be utilized."[8]

Planned Parenthood of the Rocky Mountains Medical Director and Medical Assistant (April 7, 2015):

"Medical Director: I don't know if I've ever seen a thymus, but maybe I have and I don't know that I have. I know I've seen livers; I've seen stomachs; I've seen plenty of neural – plenty of neural tissue; we usually, we can see the whole brain usually come out."[9]

"Medical Director: Here's some organs for you. They're all attached. Here's some stomach, a

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[8] Center for Medical Progress, "FULL FOOTAGE: Intact Fetuses "Just a Matter of Line Items" for Planned Parenthood TX Mega-Center" (2015) at 3:47:15, https://www.youtube.com/watch?v=MCiD9_ICt44&t=13667s (as last visited on November 12, 2018).

[9] Center for Medical Progress, "FULL FOOTAGE: Planned Parenthood VP Says Fetuses May Come Out Intact, Agrees Payments..." (2015) at 11:20, https://www.youtube.com/watch?v=wV2U9unI1NM&t=6880s (as last visited on November 12, 2018).

heart, kidney, and adrenal. I don't know what else is in there.
Medical Assistant: Tiny. Head, arms, I don't see any legs. Did you see the legs?
Medical Director: I didn't really look but . . .
Medical Assistant: Oh, look, there's – and another boy!"[10]

"Medical Assistant: Two parts and then there's arms missing.
Medical Director: But yeah, here's her head. So like, is this spinal column? Because here's her thorax. . . . Interesting.
Medical Assistant: So big.
Medical Director: And there's her heart.
Medical Assistant: And there's something over here, I don't know what this is, but that looks like an organ, too.
Medical Director: But you don't want these, right?"[11]

Medical Director, Desert Star Family Planning (October 11, 2014)

"Now the thing is I don't do inductions so, like my technique is, a disarticulation technique so, there would have, you know, we'd have to kind of talk about like exactly what it is that you were needing, because [interruption] because part of the issue is, it's not – it's just – it's a

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[10] *Id.* at 2:31:20.
[11] *Id.* at 1:54:14.

> matter of how I feel about it coming out intact. But I got to worry about my staff, and, you know, people's feelings about it coming out looking like a baby."[12]

The public was understandably outraged by the inhumanity displayed by these abortion providers. While usually hidden from public view, the providers' callousness is a logical consequence of routinely handling and disposing of the remains of fetuses whose lives they have just ended as if they were medical waste, except where particular organs could be salvaged for other uses.

Thus, it is entirely rational for a State to require that abortion providers ensure that fetal remains be disposed of in a humane and dignified manner, consistent with procedures for disposal of other human remains. For society to allow these fetal remains to be wrapped up and disposed of along with other medically tainted trash would seem to affirm the abortionists' judgment about the lack of any inherent worth in the life just ended.

As to the subjective component of the state's interest, the fetal disposition provision allows society to express to abortion providers its collective judgment that, with each abortion, the provider has ended the life of a fellow human being, in contradiction to the physician's commitment to

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[12] Center for Medical Progress, "FULL FOOTAGE: Planned Parenthood Arizona/Los Angeles/Mar Monte Dr. DeShawn Taylor" (2015) at 11:37, https://www.youtube.com/watch?v=oNCkK62UBgw&t=730s (as last visited on November 12, 2018).

healing and preserving life. The public cannot control how the provider responds to that message, but the public's interest in expressing that message is entirely rational. Moreover, in complying with the fetal disposition provisions, the abortion providers must pay tribute to the public sentiment that physicians should practice their profession with humanity and integrity.

CONCLUSION

Indiana's fetal disposition requirements are well-supported by the state's interests in the humane and dignified disposal of human remains as well as its interest in protecting the integrity and ethics of the medical profession. The Court should grant review and reverse the judgment of the Seventh Circuit.

Respectfully submitted,

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